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BOOK REVIEW.

THE LAW AND OBSCENITY by *A. K. Sarkar*, 1967 (Published by N. M. Tripathi, Ltd., Bombay-2). Price Rs. 10.

The law relating to obscene publications is scattered in a number of statutes like the Penal Code, the Press (Objectionable Matters) Act, the Sea Customs Act, etc. None of the enactments however carries a definition of the term "obscene." The term has been used indiscriminately along with terms like "indecency," "immodesty", "immoral," "pornographic", etc. What is obscene necessarily depends on the conditions, atmosphere and outlook prevailing during a particular period and in a particular place or locality. As Sir A. P. Herbert once observed "the dirt of today may be the art of tomorrow". Obscenity, in fact, is a function of many variables. Difficulty crops up when genuine art gets mixed up with obscenity. Almost a century has passed since Cockburn, C.J., formulated the test of obscenity in the *Hicklin case*,(1868) L.R. 3 Q.B. 360: "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." In England, Parliament has legislated on the matter more comprehensively by passing the Obsence Publications Act, 1959. Also at a jury trial, the book "Lady Chatterley's Lover" originally condemned as obscene has now been accepted to be within the bounds of permissible writing. Though the *Hicklin* test no more holds good in the land of its origin, in India the test has been faithfully followed and was not discarded by the Supreme Court in *Ranjit Udeshi* v. *State of Maharashtra*, A.I.R. 1965 S.C. 881, where the question was whether a sale of the book "Lady Chatterley's Lover" amounted to an offence under section 292, Penal Code. *En passant* it may be noted that in the U.S. also the *Hicklin* test as to obscenity has been rejected. The definition of "obscene" in the American Law Institute's Model Penal Code, Tentative Draft No. 6 is that "a thing is obscene if, considered as a whole its predominant appeal is to prurient interests." In England, at present, the test applied in the matter is that obscenity will be an offence unless it can be justified on grounds of *public good* as being in the interest of literature, science, art or learning. In the U.S. a book is obscene if it is "*utterly without any redeeming social value.*' *Memoirs* v. *Masseachuscts*, 383 U.S. 411. In India, negatively, it is pointed out that it is not everyfilthy or indecent article that will become obscene although all obscene articles will be either indecent, filthy or repulsive (1958 Cr.L.J. 647). In *Ranjit Udeshi's case*, the Supreme Court lays emphasis on the *quantum* of obscenity and holds that, where obscenity and art are mixed, art must be so preponderating as to throw the obscenity into shade or the obscenity is so trivial and insignificant that

it can have no effect and can be overlooked. In view of these diverse approaches to the question and the conflict as to what type of *mens rea* should exist it is high time to clarify the matter.

The book under notice is divided into 4 parts. Part I deals with the subject and the case-law bearing thereon. Part II offers a critiscism of the existing law. Part III deals with *Ranjit Udeshi's case* and Part IV indicates the way out. There are 3 appendices. Appendix I gives the text of the judgment in *Ranjit Udeshi's case.* Appendix II contains an extract from the Introduction to "Memoirs of a Woman of Pleasure" and Part III gives the text of the Obscene Publications Act, 1959. The author has dealt with the subject with imagination. The presentation is satisfactory. His suggestion for the improvement of the law is to expand section 292 of the Penal Code so as to include a definition of obscenity, as near as it may be to the test found in the English Act of 1959, and to allow expert evidence to prove the nature of the publication regarding its literary, artistic or scientific merit.

A COMMENTARY ON THE INDUSTRIAL DISPUTES ACT, 1947 by *V. B. Patel* and *B. M. Patel*, 2nd Edition, 1967. Published by N. M. Tripathy, Ltd., Bombay-2. Price Rs. 40.

The community as a whole has genuine concern in industrial relations and labour disputes. Strikes and lock-out throw economic life out of gear being anti-social acts. They also embitter the relations between employers and employed whose co-operation alone can make industrialisation effective. Factors like application of mechanical devices, rising spiral of prices, advice not always disinterested given to workers by interested third parties, etc., engender friction. The importance of healthy and proper development of industrial law, therefore, can hardly be exaggerated. Even as in constitutional disputes the fundamental rights of individual citizens have to be weighed against the public good likewise in the field of industrial relations, the common law right of freedom of contract and freedom of management regarding one's industry has to be reconciled with the requirements of social justice. Since the advent of Independence, a distinctive labour jurisprudence is developing and the Industrial Disputes Act, 1947 has made a large contribution to it. The Act has been amended from time to time including the Industrial Dsiputes Amendment Act, 1964 and the Industrial Disputes Amendment Act, 1965. There is also a respectable amount case-law under the various provisions of the Act. An important feature of the Act is the provision for industrial adjudication. Though it operates to the detriment of collective bargaining, compulsory adjudication cannot be avoided since an industrial dispute tends often to become an industrial anarchy. Industrial adjudication has a wider scope than commercial arbitration and sometimes it involves the extension of an existing agreement or even the making of a new one. It is also clear that industrial adjudication cannot be legalistic or marked by a doctrinaire approach. This is recognised by the Supreme Court in (1965) 2 S.C.J. 818, where it is observed that, in dealing with industrial disputes, industrial adjudication is generally reluctant to lay down any hard and fast rule or adopt any test of general or universal application and that the approach of industrial adjudication in dealing with industrial disputes is necessarily pragmatic and the tests which it applies and the considerations on which it relies would vary from case to case and would not admit of any rigid or inflexible formula. As a result of the majority judgment of the Supreme Court in *Bharat Bank Ltd., Delhi* v. *Employees*, 1950 S.C.R. 459, the awards of industrial tribunals are subject to appeals to the Supreme Court and important questions concerning industrial adjudication come within the orbit of the jurisdiction of that Court enabling it furnish proper guide-lines.

The book under review is laid in 4 parts. Part I provides a section by section commentary of the Act. Part II is concerned with the problems arising with reference to wages, bonus and gratuities, dearness and other allowances, and leave and holidays. Part III deals with disciplinary proceedings and in Part IV are included

material Appendices giving connected Acts and the Rules made thereunder both by the Union as well as State Governments. The author has arranged the problems of industrial law methodically and they are carefully analysed. The commentaries bear the stamp of considerable industry and legal acumen. The treatment of the subject is both lucid and comprehensive. Case-law down to the present has been noticed generally. It would be even more complete if decisions like those in A.I.R. 1966 S.C. 1051 (on whether unsatisfactory work can be regarded as misconduct), (1963) 2 S.C.J. 94 (on wage standardisation scheme) etc., were included. The book is on the whole a helpful publication.

SECRETARIAL PRACTICE IN INDIAN by *J. C. Bahl*, Eighth Edition, 1967. Published by N. M. Tripathi, Ltd., Bombay-2. Price Rs. 12-50.

The book deals with the law, practice and procedure of company secretarial work based on the provisions of the Indian Companies Act, 1956, and its amendments up to 1967. The book has passed through 8 editions within 17 years testifying to the demand for a book on the subject. From being no better than a scribe in the early days, the Secretary has come to occupy, in modern life, an important and honourable position. In the case of a company, while the Directors formulate the policies it is the Secretary that is responsible for their successful execution. Though section 2 of the Companies Act contains a sort of definition of a Secretary his position is not defined by law. His duties comprised (i) statutory duties, (ii) duties in relation to the Directors, (iii) duties to the shareholders and the public, and (v) duties relating to the organisation of his office. The instant book adverts to these various aspects. There are 28 Chapters dealing with topics like the Company Secretary, kinds of Joint Stock Companies, Formation of Public Limited Companies., Classes of Capital and Shares, Membership and Registration of Members, Share Certificates, etc. Calls on Shares and Forfeiture, Transfer of Shares, Borrowing Powers and Methods, Company Meetings and Practice, Board Meetings, Statutory Meeting, Annual General Meeting, Minutes of Meetings, Dividend and Interest, Management, Books and Annual Returns, Conversion of Companies, Alteration of Share Capital, Arrangement, Reconstruction and Amalgamation of Companies, Reports and Correspondence, and Winding-up. There are also 5 Appendices attached dealing with Documents, etc. requiring to be registered, produced or filed with the Registrar. Tables of Fees payable to the Registrar ; Matters for which sanction of the Central Government is necessary ; Matters requiring sanction of share-holders by Special Resolutions; Definitions of terms like "Associated", Branch Office, etc. The author has covered all important aspects concerning Secretarial work with clarity and felicity taking note of the latest practices as evolved in this country.

EDUCATIONAL PLANNING : Its Legal and Constitutional Implications in India.

PROPERTY RELATIONS IN INDEPENDENT INDIA : Constitutioanl and Legal Implications. Published by the Indian Law Institute. Delhi (N. M. Tripathi Ltd. Bombay-2. 1967). Price Rs. 15 each book.

These publications contain the Papers presented and discussions held at Seminars organised by the Indian Law Institute in January and December, 1966 respectively. The average man is apt to wonder why such Seminars are held and often become sceptical about their utility having regard to the precious little that is achieved and the fact that often they serve merely as forums for learned talks, not infrequently lugubrious, where various questions are posed but few practical solutions are evolved giving lead for necessary action.

As regards Educational Planning, it is generally accepted that a mess has been made of education in this country and that it is today in a state of chaos. It is

admitted that there is a huge drain of brain power to other countries with most of our brilliant men being lost to our country and that with the passing of each year, the standards of education are increasingly deteriorating. If educational planning is to be purposive, sincere and effective it has to be rescued from political nostrums. Politicians may find it unpalatable but facts have to be faced. Learned Papers characterised by research and thinking, and a wealth of information have been contributed by an array of scholars and distinguished persons. They cover topics like "Some Perspectives of Educational Planning in India" "Legislative Relations between the Union and the States and Educational Planning; Administrative Relations between the Union and the States and Educational Planning; "Protective Discrimination and Educational Planning, etc." The Editior's note states that the nature of the subject was such that no consensus could be expected. Comment is needless.

As regards property relations in Indpendent India, things are not very much better. Considerable upheavals in the systems of landholding were effected through large scale legislation whose validity had to be buttressed and ensured by constitutional amendments from time to time, which amendments themselves have now been held to be unconstitutional though as regards the future only. In the name of social justice individual rights in property are being effectively eroded by various methods not the least of which is oppressive taxation. The Papers read at the Seminar centred round the following break up: Ideological clarification and Interpretation Problems; Inter-disciplinary valuation; and Trends and Prospect. Topics like "Property Relations: The Constitutional Vision"; "Property Relations: The Constitutional Provisions"; Property Relations and Agrarian Reforms"; Property Relations and Urbanisation"; "Property Relations and Corporate Structure"; "Property Relations and Impact of Technological Revolution"; "Property Relations and Social Institutions"; "Property Relations and Regulatory Processes including Taxation"; "Property Relations and Implications of Transactional Instruments"; and "Property Relations—Trends and Prospect" were discussed. One can only hope with the Editor that the book will generate further inter-disciplinary research into the most important area of contemporary human relations in India so that enough material is available to the legal profession for arriving at functional and not merely logically consistent choices.

1967-68 SUPPLEMENT TO DIRECT TAX LAWS 1966-67 by *Dastur, Damania* and *Dastur*. Published by N. M. Tripathi Ltd. Bombay-2. Price Rs. 7.

The most basic clause in the pattern of direct taxation made recently in this country is the introduction of the principle of prospective operation of Amendments, by the Finance (No. 2) Act, 1967. The Act has made changes some of which are to be operative forthwith (sections 4 to 32, 34, 35 36 (*a*) and 36 (*b*)) and some others to be operative from 1st April, 1968. [*see* Third Schedule read with section 33, and section 36 (*c*)]. The Authors have offered comments on all the changes made by the Act except the Third Schedule. The Authors state that since the extent of the changes falling to be commented upon was comparatively small it was decided to issue merely a Supplement to their main book "Direct Tax Laws 1966-67". The publication of the main book had been generally acclaimed and the present Supplement also is bound to be helpful to busy practitioners of income-tax law, tax-payers, tax-litigants and tax-administrators.

INVESTMENT BY TRUSTEES

Duties, Powers and the Custody of Documents

By

T.V. RAMACHANDRAN

The increasing use of trusts has focused attention on the duties of trustees in the matter of investment. It is impossible to generalise on the powers and duties of trustees because each trust deed or other instrument creating the trust will normally specify the trustees' powers as respects investments. If the trust document gives the trustees power to invest in such securities as they think fit, then it gives them power to invest in any form of property and type of property without restriction. If the trust deed is silent or makes no mention of the matter, the trustees' powers of investment are regulated by the Indian Trusts Act.

The duties of trustees as respects the investment of the trust funds were clearly stated by Lord Watson in *Learoyd* v. *Whiteley*.[1] "As a general rule, the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Businessmen of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character ; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So long as he acts in the honest observance of these limitations, the general rule already stated will apply."

So it will be seen that the trustee must confine himself to the authorised class of investments and also that he must exercise reasonable care and skill in selecting appropriate investments. It is not enough that he chooses shares belonging to an autherised class of investments. He must also take reasonable care to see that those shares are suitable. What is "reasonable care" is something which depends on the facts of each case and on which there can be no general rule. To quote Lord Justice Lindley : (Re *Kingston Cotton Mill Co.* (*No.* 2)[2] "What in any particular case is a reasonable amount of care and skill depends on the circumstances of the case ; but if there is nothing which ought to excite suspicion, less care may properly be considered reasonable and can be considered if suspicion was or ought to have been aroused."

Where the instrument, creating a trust, contains express directions as to the securities upon which the trustee is to invest the trust funds, the trustee must adhere to the modes of investment prescribed. If he does not do so he will be liable for any loss that may arise.

Where the trust property consists of money and cannot be applied immediately to the purpose of the trust, the trustee is bound (subject to any direction contained in the instruments of trust) to invest the money on the following securities :—

1. (1587) L.R. 12 App. Cases, 727, 733.
2. L.R. (1896) 2 Ch. 284.

(*a*) in securities of any State or Central Government, or of the Government of the United Kingdom ;

(*b*) in stocks charged on the revenue of India ;

(*c*) in stocks, debentures and shares of Railway or other companies, the interest whereon has been guaranteed by the Central Government ;

(*d*) in securities for money issued by any municipal body, port trust or improvement trust ;

(*e*) on the first mortgage of immovable property provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-third, or, if consisting of building, exceeds by one half, the mortgage money ;

(*f*) on any other security expressly authorised by the instrument of trust.

The above securities have been recommended by the Indian Trust Act, because they are very safe. Safety is the primary object in an investment of trust funds. A trustee is not allowed to make speculative investments. A loan of trust money on personal security can never be made unless expressly authorised by the trust instrument.

A trustee can invest only in authorised securities, even where the deed of trust directs him to invest at his discretion. But he may select one of the several authorised modes of investment at his discretion (*Minet* v. *Leman*).[3]

If the trustee wants to invest trust money on a first mortgage, he should take the advice of an expert valuer as to the sufficiency of the security. Trustees, however, cannot lend trust money to a co-trustee even on mortgage (Re *Walker*).[4]

Unless authorised by the trust deed, a trustee cannot invest trust money by way of purchase of land ; and where he is so authorised, he must not purchase land at an excessive price.

A trustee enjoys the power to vary the investments from time to time, and may change a first class security into another authorised investment but the change of investment must not benefit one beneficiary at the cost of another (*Ruby* v. *Ridehalg*).[5]

Before exercising their powers of investment, other than in respect of narrower range, investments not requiring advice, the trustees must obtain and consider proper advice by qualified persons as to whether the proposed investment is satisfactory. The requirement as to diversification means that the trustees are under a duty to see that they have a well-balanced portfolio and that they are not putting all their eggs, except possibly in the case of a trust which is very small, into one basket. The duty to see that the investment is appropriate and suitable for the particular trust of course relates to the question whether the prime need of the trust is to obtain high income, or to obtain a fair balance between income and capital if there are different beneficiaries interested in income and in capital, or whether the prime need is for capital.

Trustees are not obliged by the Act, having obtained the advice which they seek, to abide by it. That is reasonable because persons giving the advice may be wrong and the trustees should as far as possible always form an independent judgment on questions of investments. But with the right to reject advice goes the responsibility for doing so and if it should turn out that the investment proved unwise and involved

3. 20 Beav. 369.
4. 38 E.R. 929.
5. 44 E.R. 929.

the trust fund in the loss of considerable money, it will be for the trustees to show that they have not been guilty of a breach of trust. On the other hand, if after accepting advice they invest the trust funds in authorised investments it will be difficult for the beneficiaries to show that they have acted wrongly.

So far as investments in stocks and shares are concerned a stock broker would be such a person who is reasonably believed by the trustee to be qualified by his ability in and practical experience of financial matters; others who could reasonably be expected by a trustee to be qualified in respect of financial matters would be accountants, bankers and solicitors. The trustees must also ("determining at what intervals the circumstance and in particular the nature of the investment, make it desirable to obtain") advice on whether the retained investment is satisfactory having regard to the need for a diversification and the suitability of the investments, and to obtain such advice accordingly.

In regard to the custody of the share certificates and title deeds relating to land the rule is that the trustee must retain the custody of all necessary trust documents themselves. Of course, where there is more than one trustee it is impossible for them all to have the custody of the trust documents and it is sufficient if any one of them has possession of the trust documents. Depositing of any documents relating to the trust or the trust property with any banker or other company whose business includes the undertaking of the safe custody of documents is in the ordinary way permitted provided the trustees, act in good faith and there is nothing untoward to excite their suspicion about the honesty of their co-trustees or bankers.

AN ANCIENT MURDER TRIAL.

By

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I propose to examine the administration of justice as revealed through the ninth Act of Mricchakatika. It is true that both the authorship and the date of this evergreen drama are clouded in gray mystery. Pischel ascribed the play first to Bhasa and later to Dandin.

According to Sylvan Levy the drama is written by the author of Charudatta. However its authorship is generally attributed to the King Shudraka who on Dr. Saletorc's authority was a Southerner. Chronology is often a matter of enlightened guess work in the field of Sanskrit literature. The well-merited theories about the date of the play range between 2nd Century B. C.to 8th Century A. D. From this thousand-year span of the probable period of construction of the play I prefer the date 4th or 5th Century A. D. as given by Dr. Kane. Leaving aside these rival hypothesies of authorship and date we can say with Shakespeare that after all " the play is the thing."

In the prologue Shudraka mentions *inter alia* that the play is to depict miscarriage of justice. The 9th Act is styled as Vyavahara or the law suit. I would discuss the law and legal procedure as unfolded in this Act with reference to the relevant Smritis and to the modern law. Dr. Jolly remarks " The ninth Act of the Mrichhakatika called the law suit describes the judicial proceedings held by one of the Chief Judges of the king in his capital. The constitution of the Court is here essentially the same as in the royal Courts of the Smritis, even the terminology is in agreement with the Smritis."

Thus, Dr. Jolly speaks in terms of the influence of the Smritis in general on this Act while Dr. Kane specifies some of them. Observes Dr. Kane " It is very instructive to compare the procedure described in it with that gathered from Narada, Brhaspati and Katyayana who constitute the leading triumvirate on law and procedure in the Smritis and who probably flourished a little before and a little after the drama. It will be found on comparison that the procedure in the drama is in essentials, the same as that of the three Smritis mentioned above, though there is some difference in minor details." In Act IX we find the highest Court in Ujjain presided over by the Chief Justice aided by two assessors or associate judges. Two complaints are filed before it. One by Sakara accusing Charudatta of the murder of Vasantasena for greed of gold. The other complaint is lodged in the midst of Charudatta's trial by Viraka, one of the Captains of the city guards against his colleague Candanaka for assault. The former is investigated and tried completely by the Court while the other is adjourned for want of time.

The Act opens with the Court peon Shodhanka arranging the Court furniture. The Court scene is laid in the Hall of Justice called the Vyavahara Mandapa or Adhikarana Mandapa in Ujjain. According to Sankha and Brhaspati the Court of Justice was to be situated to the East of the Royal palace and was to face the East. By this injunction probably, the Smritikaras intended that the Judge should never swerve from the sun-shine of truth. In this Act however, there is no indication whether the Court house complied with this oriental bias. In mordern times no such geographical considerations prevail and the Courts may face the lawyers and the litigants. The Court House seems to be situated near the palace as the royal order

is brought to the Court instantaneously. The Court had a beautiful grassy quadrangle where Sakara awaits the arrival of the judges. Brhaspati has stated in Rajadharma Kanda that the Court House should be decorated with flowers, statues, paintings, idols of the Gods, etc. At present also we come across Courts decorated with the statues of the judges and jurists and pictures of national leaders and with the idol of the Goddess of Justice.

The action in Act IX appears to take place in the morning next after the alleged offence. The action of the previous Act culminating in the strangling of Vasantasena by Sakara occurs by mid day as the latter refers to the mid day. There are indications in the IX Act showing that the trial took place on the following morning. Sakara enters immediately after bath, which is generally taken in the morning. Further Viraka refers to his having passed a sleepless night brooding over the insult meted out to him by his colleague. It will be reasonable to read a clear reference to the morning in the judges lament that the appearance of the King's brother-in-law is like the eclipse at sunrise. From Manu VII 145 and Yaj. I-327 it is clear that the king was directed to hold the Court in the morning, which is to be held in the Sabha. At present generally the Courts are held from 11-A. M. onwards.

In Act IX, the Court is presided over by the Chief Justice called the Adhikarnaika. He is asissted by two assessors or associate Judges *viz.*, Sresthin, a prominent merchant or Banker and a Kayastha *i.e.*, a scribe and an accountant. All these constitute the Court and are collectively mentioned as Adhikaaranikas or Adhikaranabhojas. In IX-3 the judge is called Drasta as one who looks into the merits of the case. Charudatta greets the Chief Justice as Adhikrta, one who is authorised by the king, while he greets the two assessors with the terms Niyukta, those appointed by the King, meaning for the session or a portion thereof.

The qualifications, qualities and duties of an ideal judge are expounded in verse 5. A good judge should be learned in law and must have the gift of the gab, He must be impartial and incorrupt and must gracefully conduct the proceedings without losing temper. His principal duty is to separate the chaff of falsehood from the grain of truth in order to protect the weak and punish the wicked. Narada says "Just as physician takes out from the body an iron dart by means of surgical instruments, so a judge should extricate from a case the deceit or falsehood". The judicial virtues set out here echo Katyayana's verse " Dantam Kulinam, etc." quoted by Mitakshara on Yaj. II-3. The picture of the ideal judge in Mrichhakatika is a universal one except for the requirements that the judge should avoid the king's wrath. It militates against the independence of the judiciary.

According to Manu VIII-1 the king should dispense justice with the assistance of Brahmins. The king may delegate his judicial authority to a Court consisting of a learned Brahmin assisted by three Brahmin Sabhyas who should be also learned (Manu VIII, 9-10-11). Katyayana says that if no erudite Brahmins are available a Kshatriya or a Vaishya well-versed in law may be appointed. In this Act it seems that the two non-Brahmin assessors are appointed by the King Palaka in absence of well-qualified Brahmins. This is in conformity with the exception provided by Katyayana. These two assessors take an active part in the conduct of the investigation and the trial. They interrogate the accused regarding the movements of the murdered woman. They question critically Viraka as to how he dared assert that

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the mutilated body he found at the alleged scene of offence was a female body and not a male one. They ask the old mother to identify the ornaments produced before the Court accidentally through Maitreya's foolhardiness. They also exhort the accused to tell the truth . They are like the modern jury associated with the presiding Judge as judges of facts. This inference is clinched by the question put by them to the Chief Justice as to on whom the burden of proof lies, which is a pure question of law of which the judge is the sole competant authority. The two associate judges like the Asivins of Rgveda are bracketed as acting and speaking jointly throughout. They seem to be men of the world endowed with common sense assisting the judge in investigating the complaint and arriving at the truth. They are Sabhyas. That the Sabhyas form part of the Court is conclusive from Narada's statement (1.3, 17) that the thorn of injustice may be removed only when the whole college of judges are unanimous about the decision. Thus herein we see the fore-runner of the modern jury system which is now abolished in the Maharashtra State, but is still prevalent in some parts of India. In the U. S. A. and U. K. the Jury is associated with the Judge both in Civil Suits and Criminal Cases. Kayastha or the scribe is an important Court Officer. He is like the modern Clerk of the Court or the Bench Clerk. He takes down important pieces of evidence at the order of the Chief Justice. It may be contended that if the Kayastha is a Judge how he can take down the evidence which is the function of the Clerk. In modern times also Judges and Magistrates take down evidence in their own hand and hence taking down evidence by the Kayastha does not offend against his prestige as a Judge. As I have said he is a Sabhya *i.e.*, member of the tribunal.

Another Court-officer is Sodhanaka, the Court Peon. He arranges the furniture of the Court and summons the accused and the witnessess. In the end he conveys the Court's message to the king and brings his order imposing capital punishment on the accused. He is the Purusa or the Sadhyapala who was to be hereditary, strongly built, a Sudra and obedient to the Judges (Vyasa in Parasara Madhava) and forms one of the ten limbs of the Court.

Traditionally a law Court in India had ten limbs or Angas. According to Brhaspati, they are the King, the Chief Judge, the Sabhyas or associate Judges, the Smritis (law books or the Library), the accountant, the scribe, gold, fire, water and Court peon. In Act IX we have all these limbs except the king. Manu and Yajnyavalkya permitted the king to delegate his judicial work to the qualified Court. The gold, fire and water were modes of divine proof or ordeals (IX-43). Thus in the IX Act we get a fullfledged picture of the Court of Judges constituted in accordance with the then existing law. In mordern times we have all these pristine limbs of the Court, except the ordeals. However, it is still open under section 8 of the Indian Oaths Act, 1874, by consent of parties to take a special oath in order to prove one's claim and such evidence is regarded as conclusive proof. Thus, in principle divine proof may be still resorted to by consent of parties.

What kind of Court is depicted in this Act ? Brhaspati enumerates four kinds of Courts *viz.*, ' Pratisthita ' or one having a fixed locale ' Apratisthita' or a circuit Court, Mudrita or a Court of Judge appointed by a King who could use the royal seal and Shasita or Court presided over by a king. The Court represented here, it is submitted is of the third type,-Mudrita-as Charudditta addressed the Chief Justice as the Adhikrta. Modern classification of Courts includes mobile Courts. There is no king now to preside over a Court.

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In the Smriti period the distinction in the terminology used in connection with Civil and Criminal Courts does not seem to be maintained as in our times. The aggrieved party approaching a civil Court is called a Plaintiff and his statement filed in Court is known as a Plaint. The opponent is called a Defendant and his statement is called a written statement. In a criminal Court we have a Complainant who files this complaint and the Accused who files the written statement. In Act IX the complainant Sakara is called Karyarthi or Arthin and the Accused is called the Abhiyukta or Pratyarthin, Yaj. II-6 uses the words Arthin and Pratyarthin. The complaint is mentioned as Vyavaharapada or Vivada and the whole case of legal proceeding is called the Vyavahara. The term Vyavahara also means law. The plaint is called Paksha, Pratigna or Bhasa (Mit. on Yaj. II, 6). From the term Bhasa the first stage of a law suit is called Bhasapada. The words for Plaintiff and Defendant are Vadin and Pradivadin. Offence is mentioned by the word Akarya.

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Here, before the High Court of Ujjain the complainant Sakra lodges the complaint that some unknown persons had strangled Vasantasena a dancing girl to death for greed of her ornaments, in a garden outside the City. He does not name any suspect. The special feature as compared with the modern procedure is that the complainant does not go to the police to lodge the complaint in such a serious case of murder so that the Police may investigate the offence *i.e.*, arrest the suspect and collect the evidence. Hence we find the Court and not the Police recording the complaint of Sakara known to us as a First Information Report. It seems thus that in ancient India it was the Court which carried the investigation and conducted the trial. While in our times the Police investigate an offence and the Court tries the offender. There is a clear separation of functions of Police and the Court now. The Chief Justice is a shrewd person and he directs the Clerk to note the words 'Na maya' (not by me) used by Sakara. Katyayana says that the Judge should have the plaint written down on a board (or on the ground) with a piece of chalk as narrated naturally by the Plaintiff, and then it should be recorded on a leaf (or paper) when it is corrected (after the defendant appears) and the Plaintiff can amend it till it is finally settled.

The complainant's case is then investigated by the Court. The Chief Justice tells the assessors that every complaint has a two-fold aspect *viz.*, allegations and facts, or truth. Firstly, there is a investigation of the allegations which depends on the statements of the parties *i.e.*, the pleadings. Secondly, there is an investigation of the facts which depends upon the wisdom of the Judge.

Now the judicial investigation starts. At first the mother of the deceased Vasantasena is summoned. From her evidence it is seen that her daughter had gone to Charudatta who is hence summoned. He is interrogated. He admits that Vasantasena was with him but gives evasive replies as to how she went home, whether on foot or by cart. At this critical stage when clouds of suspicion begin togather round the accused, Viraka, the Commander of the Guards appears in the Court for lodging his complaint against his colleague. From him the Court gathers that Vasantasena was seen going in the accused's cart to the alleged scene of offence. Viraka is deputed there to make an on the spot inspection. He goes and comes back and reports that a female body mangled by beasts, and in an unidentifiable condition is lying there with her ornaments missing. At this stage the judge remarks that the more skilfull the investigation the more complicated it becomes. Law is clear but mind is like a mud-logged-cow. This telling simile portrays the indecision of a Judicial mind

steeped in doubt. Now at Sakara's protest the accused who was first given a seat of honour is made to sit on the ground as a *prima facie* case was made out against him. In modern parlance we may say that the charge for murdering Vasantasena is framed against the accused.

By now, Sakara whose complaint is initially viewed by the Court as a frivolous and vexatious litigation is on top and presses the accused to admit his guilt. In modern law not only such an accusation of murder is investigated by the Police but the preliminary inquiry is held thereafter by the Committing Magistrate who in proper cases frames the charge and commits the accused to the Court of Sessions, for trial. The Sessions trial begins with the plea of the accused. In Mrichhakatika we find that the functions of the Police, the Committing Magistrate and the Sessions Judge is performed by the Highest Court of Ujjain.

As charge is framed, here also the accused is put on his plea. In the meanwhile Maitreya appears in the Court and tries to assault the complainant. The gold ornaments drop down from his person. The findings of the ornaments from the accused's friend who is considered as his accomplice clinches the guilt of the accused, as establishing the motive for the murder. Charudatta is hence taken into custody by Shodhanka. In morderr language you may say his bail was cancelled. The old mother knows the position in law and makes a plea for mercy for the accused, and points out that a legal proceeding is between the aggrieved party *i.e.*, herself and the accused. It is like the present application for compounding an offence. But the capital offence of murder is throughout non-compoundable. The Court rejects her plea and pronounces the verdict of guilt and recommends to the king the punishment of banishment for the accused as according to Manu a Brahmin cannot be condemned to death. The King however, sentences the accused to death.

In this trial three witnesses have been examined for the prosecution *viz.*, Sakara, Vasantasena's mother and Viraka, while for the accused the only defence witness is Maitreya. Charudatta's defence is that he is innocent and that he is so tender-hearted that he does not harm even a creeper, how could he dare to kill the reigning beauty of the City. Maitreya echoes the defence and speaks about the generosity and charity and past good conduct of his friend. Evidence of good character of an accused is admissible even now under section 53 of the Indian Evidence Act. The old mother also feels that he is not guilty. The Chief Justice observes that the appearance oft proclaims the man. Manu in VIII-25 , 26 states that the appearance and the demeanour of a person is significant in discerning the inner man. But the net of circumstances so conspire against the accused that he is held guilty on unsound circumstantial evidence.

Act IX of Mrichhakatika is a notorious specimen of miscarriage of justice caused by circumstantial evidence. There is no direct eye witness to the murder of Vasantasena. But the string of circumstances produced before the Court is apparently so impregnable that the Court concludes that the accused is guilty. The first link in the chain of the circumstantial evidence is that the deceased dancer was last seen in the company of the accused in the rain scene (Act V) as stated by the mother of the deceased and admitted by the accused. Association of the accused with the deceased just before the offence is one of the vital links in the chain of circumstantial evidence.

The second factor is the evidence of Viraka who states that when he was inspecting the carts on the road to trace the fugitive King Aryaka he saw Charudatt's cart and its driver told him that Vasantasena was going by that cart to the garden in question. The third link is the finding of a female body in the garden without any ornaments. The most vital link was the discovery of the ornaments whose possession by the accused's friend is construed as constructive possession of the accused himself. The motive *viz.* greed for gold gained confirmation from the fact that the accused was poor now, while the victim was a rich lady of untold wealth. Lastly, the conduct of the accused in giving evasive replies to the Court darkens the clouds of suspicion against him. In the result he is held guilty.

The chain of circumstantial evidence appears *prima facie* to be solid and sound and incompatible with the innocence of the accused. But a closer analysis would point to the contrary. The important circumstance *viz.* that Vasantasena was seen going to the garden in Charudatta's cart is based on hearsay evidence as Viraka has not seen that himself and relied only on the dirver's statement. How dangerous it is to rely on second hand evidence is seen here as Aryaka was in fact travelling in the veiled cart in question. Secondly, there is no identification of the female body in the garden. Thus it is not established paradoxically, that the deceased is in fact dead. It was the body of an unknown woman who was perhaps killed in the storm by an uprooted tree. Further it is not proved that the ornaments in Court were last worn by the deceased. Thus the chain of circumstantial evidence on which the accused is condemned is so weak as not enough even to hang a dog.

It seems that the Court was overawed by the complainant's patronizing position. In fact initially the judges are reluctant to entertain his complaint and convey to him, rather improperly, that the Court has no time to look into his complaint. But on being threatened with dismissal they record his complaint. Sakara notices this and says that whatever I say I will make them believe. Hence the judge laments "It is very easy for a judge to earn censure, while the chances of his being praised are few and far between." (V. 3, 4)

Circumstantial evidence was called 'Yukti' by Katyayana and 'Anumana' by Brhaspati and is recognised as a mode of proof. But there were certain rules in their behalf. Narada says that a murderer is proved to be guilty if found armed near the murdered persons. This test was also not followed by the Court here and so it fell into error. Miscarriage of justice sometimes results from relying on circumstantial evidence. A classic example from English Law is that of Bradford an innkeeper of Oxfordshire (1736) who was executed for murdering Hayes, one of his guests at the inn. On hearing groans at night other guests rushed into Hayes's room and saw Bradford bending over him, holding a lantern in one hand a knife in another his hands being blood-smeared. He explained that on hearing groans he went into Hayes's room with a lantern, and had carried the knife in self-defence. As he was trying to save Hayes his hands got blood. His explanation was rejected and Bradford was executed. After a year the footman of Hayes confessed that he had murdered Hayes.

In IX Act the Judges only pronounce the verdict of guilty and recommend punishment of banishment as Charudatta being a Brahmin could not be condemned to death on Manu's authority (V-380 Manu). They refer the matter to the king for pronouncing the sentence. Manu (VIII-129, and Yaj. 1367) enumerate four types of punishment

viz., gentle admonition (dhigdanda), severe repoof (vakdanda), fine (dhanadanda) and corporeal punishment (Vadhadanda). Brahaspati says that the first two punishments can be inflicted by a Brahmin Judge, but the rest only by the King on the recommendation of the Chief Justice. Here we find that the same procedure is followed. Now the Magistrate can pass a proper sentence but a death sentence passed by a Session Judge is subject to confirmation by the High Court.

Some remarkable features regarding the administration of justice as revealed in this Act especially in the light of modern jurisprudence and practice, may be considered here :—

Long ago, Shakespeare spoke about the proverbial delays of law. But it seems that the Court in ancient India realised the stautory principle that justice delayed is justice denied. The investigation as well as the trial is finished here in the morning session. Specific provision was made for eliminating delays. Yaj. II-12 enjoins that in the case of murder the accused must make his reply at once and no delay can be brooked. Kautilya (III-1) prescribes fines for delay in filing written statement. Katyayana (339) and Shukra (IV-5, 167, 209) state that delay in deciding cases is tantamount to death of Justice, 'dharmavyapatti.'

Constitution of India in Article 50 prescribes the separation of the Executive and the Judiciary as one of the directive principles. Accordingly, this reform was introduced in the old Bombay State in 1953. Even now we have some States where this principle is not given effect to. But in ancient India the Judges were independent of the Executive and their sole duty was to dispense justice, though under pressure of the King's unscrupulous brother-in-law here we see the judges dispensing with justice. Some remarkable modern features of administration of justice which are conspicuous by absence are the Court-fees and the Advocates. Neither of the two complainants here is required to pay any Court-fees while lodging his complaint, as at present. In those days fines imposed on the guilty were credited to the treasury but no Court-fee was charged. In some European countries even to-day no Court-fees are levied. It is clear that justice in ancient India was not only quick but free too. The class of Advocates was not in existence, then. But Shukra (IV, 5, 114-117) states that a person may be appointed to represent a party and his wages should be proportionate to the value of the suit. Such a person was called Niyogi. Here we have no Niyogi for Charudatta.

Yajnyavalkya says (II-8) that a law suit has four stages, the procedure followed in this Act is in conformity with the four stages of a law suit as mentioned by Brahaspati (II-6-8) *viz.*, Purvapaksha or (Bhasapada), the plaint, Uttarpada, the reply, Kriyapada, the leading of evidence and Nirnaya, the decision. Katyayana also says the same thing as quoted by Apararka. These four stages are seen also in Modern law."

Three salient principles of mordern criminal law are firstly that the accused is presumed to be innocent till he is proved to be guilty ; secondly, that the burden of proof to show that he is guilty is on the prosecution ; and lastly, that the guilt of the accused must be proved beyond reasonable doubt and in case of doubt the benefit must go to the accused, and that he must be held to be not guilty. Now all these principles, it is submitted were recognized in ancient India. Charudatta was considered innocent till the guilt was proved by circumstantial evidence. Further, throughout the trial the burden was discharged by the prosecution, here, the Court

and when the Court is satisfied beyond doubt, rightly or wrongly, then only the accused is found guilty. Further, when the ornaments are discovered, and Charudatta makes a forced and implied admission of his guilt Sakara says that the doubt is over. This clearly shows that the guilt of the accused had to be proved beyond reasonable doubt.

The Court first asked the Court peon to summon—Charudatta with a respectful request that the judges wanted to see him. This corresponds with the letter of request, sent by modern Courts to men of position. Despite the praiseworthy features, there was one disgusting aspect of the ancient trial *viz.*, extorted confession. In V-36 the Chief Justice threatens Charudatta to confess on pain of being whipped. This shows that there was no ban against testimonial compulsion. There was no protection to the accused as guaranted by Article 20 (3) of the Constitution against self-incrimination.

Half the punishment shall be excused if the accused confesses his guilt says Narada. Charudatta almost confesses that he murdered Vasantasena (V-38) and the judge accepts this still-born confession and condemns him on questionable circumstantial evidence coupled with an extorted confession.

In V-43 there is a clear reference to ordeals of poison water, balance and fire. Charudatta complains that though he has prayed for resorting to any of these ordeals it was denied to him. I think he was rightly refused the test of ordeals or th e divine proof as it was to be resorted to only in absence of human proof, which was available. Ordeals form part of the ten limbs of a law suit.

It is rather strange that the Court is so tolerant about its own gross contempt. Sakara wipes out the words of evidence with his foot. Maitreya assaults the complainant under the very nose of the Court. These are serious interferences with the course of justice and would have been punished by modern Courts severely, for contempt of Court.

A special mention must be made to the critical description of the Court and its functionaries as made by Charudatta in V-14. The Court is compared to an ocean. The Judges deep in thought are its waters. The messengers hurrying to and fro are its waves. The spies (C.I.Ds) are its crocodiles. The scribes are its snakes. Mention is also made of elephants for trampling down the criminals. Here we have a specimen of a Court functioning under a tyrant. The judge was afraid of the King's favourites, and hence the indepenuence of the judiciary was not obtainable. The only irresistible result is gross miscarriage of justice.

It is a unique Court scene depicted on stage as that in the "Merchant of Venice." The two Court scenes are typical of the Eastern and the Western outlook. The latter is remarkable for the triumph of human effort *viz.*, Portia's over the misfortunes brought by a stroke of ill-luck to Antonio who loses his ships in the storm. While here we see Charudatta resigning quietly to the conspiracy of fate. Thus the latter is dominated by free-will while the former is licked by fatalism.

Keith observes "The Court scene in Mrichhakatika conforms duly to the requirements of legal smritis of 6th and 7th Century. A.D. But the conservatism of the law renders this no sign of date. " It seems that the IX Act reflects the legal procedure as enshrined in the Smritis like Katyayana, Brhaspati, Narada, Manu and Yajnyavalkya.

Hence Horrwitz says that in Mrichhakatika we get a graphic picture of society in medieval India. Wilson remarks "the chief value of Mrichhakatika aside from its interest as a drama lies in the graphic picture it presents of a very interesting phase of everyday life in ancient India." Keith rightly calls it a transcript from life. Thus we may agree with Winternitz that the play is of extraordinary value in respect of our cultural history. That is why scholars like Macdonell and Dr. Ryder discern a Shakespearean touch of genius in the author of Mrichhakatika.

A PLEA TO AMEND THE PROVINCIAL SMALL CAUSE COURTS ACT

By

T. S. SUBRAMANIAN, ADVOCATE, TIRUCHIRAPALLI.

A Junior Advocate filed a petition for attachment before judgment of immovable property in the Sub-Court in a small cause suit of value over Rs. 500, which was rightly dismissed by the Judge as per law as is extant. Presumably the young lawyer thought that as attachment before judgment is available in original suits it should be equally available in small cause suits also—a presumption not fallacious in common sense according to what is stated herein **infra.** An original suit on a promissory note for over Rs. 500 though below Rs. 2,000 in a Munsifs Court, wherein only the suit lies, if it is a transaction outside municipal limits clothes the suitor with the right to obtain an order for attachment before judgment of immovables, whereas within town-limits a suit on a promissory note for over Rs. 500, but less than Rs. 2,000 again of a small cause nature (necessarily to be filed in a Sub-Court) disentitles the party to ask for attachment before judgment of immovables according to the Provincial Small Cause Courts Act. Now between two parties one of the municipal town and the other of the rural parts, in suits on promissory notes, different procedures of law are being prescribed as to attachment before judgment of immovables, which makes discrimination in favour of one as against the other, on the same causes of action, and for the same amount. And more than that it may be in a number of cases the plaintiff may have only a small cause suit in a Sub-Court as his only fortune (now that the jurisdiction is upto Rs. 2,000) and if the defendant may alienate his only immovable property, the plaintiff may have no remedies left ultimatley. Therefore, it seems to me, that an amendment of the Provincial Small Cause Courts Act may be made at least in the stage of trial to make available attachment before judgment of immovables, leaving further remedies in execution to be had on the original side execution. Changes in law are made according to the exigencies of time, and recently, we had the Limitation Act considerably changed. Why not amend the Provincial Small Cause Courts Act also suitablly?

RIGHT OF ADVOCATES TO APPEAR BEFORE INDUSTRIAL TRIBUNALS.

By

P. G. RAJAGOPALAN, ADVOCATE, CALICUT-2.

The right of advocates to appear before Industrial Tribunals is restricted by section 36 (4) of the Industrial Disputes Act, 1947.

Section 36 (4).—In any proceedings before a Labour Court, Tribual, National Tribunal, a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceeding and with the leave of the Labour Court, Tribunal or National Tribunal, as the case may be.

Is this provision still operative after the Advocates Act, 1961 came into force ? It is submitted that it is impliedly repealed by section 30 of the Advocates Act.

Section 30.—Subject to the provisions of this Act, every advocate whose name is entered in the common roll shall be entitled as of right to practice throughout the territories to which this Act extends,—

(i) ....

(ii) before any Tribunal or person legally authorised to take evidence; and

(iii) ....

In contra distinction to section 30 of the Advocates Act, the right of the advocates under section 14 of the Indian Bar Councils Act is as follows:—

Section 14.—(1) An advocate shall be entitled as of right to practise—

(a) subject to the provisions of sub-section (4) of section 9, in the High Court of which he is an advocate, and

(b) save as otherwise provided by sub-section (2) **or by or under any other law for the time being in force, in any other Court and before any other Tribunal or person legally authorised to take evidence, and**

(c) ....

(2) ....

(3) ....

The right under the Indian Bar Councils Act is subject to any other law for the time being in force whereas the right of advocates under section 30 of the Advocates Act is without any such restriction. Since the Advocates Act, 1961 is a later enactment and it is inconsistent with section 36 (4) of the Industrial Disputes Act, 1947, it must be deemed to have been impliedly repealed.

It is a well accepted rule of interpretation that if there are two ways of interpreting a statute, one which leads to the conclusion that the Act is **ultra vires** the Constitution and another which leads to the conclusion that the Act is not **ultra vires**, then the latter interpretation must be accepted. The above interpretation of implied repeal has to be accepted, otherwise section 36 (4) has to be struck down as violating the right to practice the profession under Article 19 (1) (g).

When the Indian Bar Councils Act was in force the validity of section 36 (4) was considered by the Madras High Court in **Rangaswami** v. **Industrial Tribunal**[1].

1. (1953) 1 M.L.J. 315.

It was held that the right to practice the profession is circumscribed by the Bar Councils Act, the very charter under which the advocates get the right to practise and therefore there is no violation of Article 19 (1) (g).

Subba Rao, J.: "If so the first petitioner's right to practise is subject to the limitation contained in the Bar Councils Act. One such limitation is that he shall be entitled to practise save as otherwise provided by or under any other law for the time being in force in any other Court in British India and before any other Tribunal or person legally authorised to take evidence. Section 36 (4) of the Industrial Disputes Act is certainly a law limiting his right to practise before a Tribunal. He cannot accept the privilege or right to practise before Tribunals and at the same time reject the limitation subject to which the right was conferred on him."

Therefore it is clear that it was because of this limitation contained in the very charter which conferred on the advocates the rights to practise, it was held that there was no violation of fundamental rights. As has already been pointed out the right under section 30 of the Advocates Act is not a restricted one as in the case of the Bar Councils Act.

In a similar case[2], the Bombay High Court had held that Rule 36 of the Bombay Co-operative Societies Rules restricting the right of advocates to appear before arbitrators were not **ultra vires.**

Chagla, C.J.: "It is a right subject to the provisions of any law for the time being in force. Therefore the only right of a lawyer that has been safeguarded under the Constitution is the right to practise the profession. Now, the right not being an absolute right, no absolute right is conferred upon the lawyer by the provisions of the Constitution. **The Constitution guarantees to the lawyer such right as he has under his charter. If any such right is affected or contravened, then undoubtedly he can rely upon the provisions of Article 19 (f).** (sic.). But if the right given to him is a limited right and that right is not affected, he cannot claim a wider right or larger right under the Constitution."

The basis, on which these two High Courts have held that the right to practice can be restricted, is not available now. There is a total deviation in the Advocates Act in regard to the right of advocates from the Bar Councils Act. Section 29 of the Advocates Act recognises advocates alone as a class of persons entitled to practise the profession of law. Under section 33, subject to any other law for the time being in force no other person is entitled to practise in any Court or before any other authority. Section 45 prescribes the penal provision for violating section 33 of the Act. Thus the Advocates Act is a comprehensive enactment dealing with the right of advocates and others in respect of their rights and duties before a Court or Tribunal. The rule that a special law should prevail over a general law is not applicable in this case because the intention of the legislature is clear. The legislature must be presumed to know that there are judicial decisions which have upheld section 36 (4) on the ground that the charter under which the advocates claimed their right is a restricted one. Knowing the judicial interpreta-

2. *Mulchand* v. *Mukund Shivram*, A.I.R. 1952 Bom. 296.

tions, the legislature has made a significant deviation in section 30 of the Advocates Act and omitted the provision "save as otherwise provided by or under any other law for the time being in force." Section 33 of the Advocates Act says that it is subject to any other law for the time being in force whereas section 30 does not contain any such limitation. Therefore it must be presumed that the legislature intended that section 30 should override other provisions contained in any other enactment.

It may be pointed out that the provision contained in section 36 (4) of the Industrial Disputes Act is repealed by section 50 (2) (3) (e) of the Advocates Act which runs as follows:—

Section 50 (2) (3): On the date on which Chapter IV comes into force, the following shall stand repealed, namely:—

(a) ....

(b) ....

(c) ....

(d) ....

(e) the provisions of the Letters Patent of any High Court and **of any other law conferring on a legal practitioner the right to practise in any Court or before any authority or person.**

Section 36 (4) of the Industrial Disputes Act is a law which confers a right, though a restricted one, to practise before the Tribunal and hence section 36 (4) can be considered as "any other law conferring on legal practitioners the right to practise in any Court or before any authority or person" for the purpose of section 50 (2) (3) (e) of the Advocates Act.

A RECENT DECISION OF THE SUPREME COURT ON THE MADRAS BUILDINGS (LEASE AND RENT CONTROL) ACT, 1960.

By

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The Supreme Court of India has on 25th March, 1968, pronounced judgment in *A.R. Salay Mohamed Sait, etc.* v. *Jaffer Mohamed Sait's Memorial Dispensary Charity and others*[1] which has far reaching consequences for litigants in Madras State. Their Lordships have held therein (the present writer having appeared for the successful party in the Supreme Court) that the decisions of the Madras High Court in *Ramaswami Pathar* v. *J. K. Devasthanam*,[2] *Palaniappa Chettiar* v. *Vairavan Chettiar*,[3] and *Palaniappa Chettiar* v. *Babu Sahib*,[4] had been wrongly decided. In the view of the Supreme Court, in order to determine whether the lease is of a vacant land or of a building within the meaning of the Act of 1960, we must take into account both the form and the substance of the transaction. If in form, the lease is of vacant land only, and the structures belonged entirely to the lessee, they do not form the subject-matter of the lease and the operation of the Madras Rent Control Act is excluded. By the mere fact that there were structures on the demised land at the time of the original lease or at the time of renewal of the lease, which do not belong to the lessor, the demise of the land cannot be construed as demise of a building on the ground that the land became an integral part of the building. In the last of the three Madras decisions, it was held that, when the parties contemplated the putting up of structures over the demised land by the lessee, as soon as a structure is put up, the lease becomes a lease of a building within the meaning of the Act. This decision had the effect of taking away the valuable rights conferred on tenants by the Madras City Tenants' Protection Act in the cities to which it had been made applicable. Landlords have been able to obtain orders of eviction of tenants, from the House Rent Controllers, from the demised lands after removal of the structures put up by the tenants, against the provisions of the Madras City Tenants' Protection Act, which had become a dead letter. In areas to which the Madras City Tenants' Protection Act, is not applicable, the landlords of demised vacant lands have been unable to get possession except on the grounds set forth in the Rent Control Act and have been put to great hardships in consequence. The decision of the Supreme Court has set right the position and the same is timely, as there are a large number of cases pending in the District and Sub-Courts and in the High Court arising out of judgments based on the now overruled decisions of the Madras High Court.

[END OF VOLUME (1968) I M.L.J. (JOURNAL).]

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1. Civil Appeals Nos. 880 and 881 of 1968.
2. (1963) 1 M.L.J. 60.
3. (1963) 1 M.L.J. 130.
4. (1964) 1 M.L.J. 110.